IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Frank R. Ferrarelli, Plaintiff, vs. Federated Financial Corp. of America, Defendant.	))))))))))	CASE NO.: 1:07-CV-685 JUDGE: MICHAEL R. BARRETT

Reply in Support of
Defendant's Motion for Summary Judgment

I. Introduction – "But, he got a loan."

It has been Plaintiff's consistent position that his inability to receive financing for a home remodeling project, which would have benefited his ailing mother's mobility restrictions, has caused him unimaginable suffering. Plaintiff blames his inability to receive such a loan on Federated's derogatory trade line which appeared on his credit reports. It is his claim that Federated "failed to eliminate these derogatory references to the fraudulent Account," in contradiction to the statutory requirements set forth in Section 1681s-2(b) of the Fair Credit Reporting Act.

Whatever else Plaintiff may argue to create an issue of fact, Plaintiff cannot dispute the fact that he received a loan adequate to complete that remodeling project two days after Federated's duty to conduct an investigation under the FCRA arose, twenty eight days before Federated's duty to complete that investigation expired, and two months prior to the death of Plaintiff's mother. Though he "can't stop thinking about what [he] could have done to comfort her if [he] had the funds sooner" – Plaintiff also can't explain why, instead of using that loan to lessen his mother's terrible burden, he used that loan to pay down some of his substantial, personal debt. Doc. No. 39, at pp. 17-18.

In an attempt to avoid the obvious pitfalls concerning his theory of causation, Plaintiff has simply fabricated a new theory upon which his damages are based. He now states that this case has nothing to do with his inability to receive a loan to help his ailing mother – rather, he now ties his damages to a new theory of causation, which is "irrespective of his inability to obtain a loan." This contradictory theory of Plaintiff's own making does not skirt his burden to point to facts in the evidentiary record to create a genuine issue of fact.

In addition, his opposition brief fails to marshal any facts in the record which establish that Federated's investigation of his credit dispute did not comport to the requirements of Section 1681s-2(b) of the FCRA. Instead, Plaintiff has merely come forward with conclusory assertions of law, meaningless facts unsupported by the evidentiary record, and the unsupported proposition that "[n]o juror would find [Federated's] investigation reasonable." For these reasons, and those spelled out more fully below, this Court should grant Federated's Motion for Summary Judgment.

II. Law and Argument

In *Celotex Corp. v. Catrett,* the Supreme Court held that the party which does not bear the burden of proof at trial can establish a prima facie demonstration at summary judgment by pointing the Court to the lack of evidence in the record on an essential element of the plaintiff's claim. 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986). By doing so, the burden shifts to the opposing party to "go beyond the pleadings, and by his own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.,* at 324.

Here, Federated's motion for summary judgment pointed out the following:

a) There is no evidence in the record supporting Plaintiff's claim under the FDCPA (Doc. No. 39, at pp. 13-14);

b) There is no evidence in the record supporting Plaintiff's claim that Federated's investigation of his credit dispute under the FCRA was not reasonable (Doc. No. 39, at pp. 14-17);

c) There is no evidence in the record supporting Plaintiff's claim that Federated's alleged violation of the FCRA was willful (Doc. No. 54, at p. 17);

d) There is no evidence in the record establishing a causal relation between Plaintiff's alleged emotional distress and Federated's alleged violation of the FCRA (Doc. No. 39, at pp. 17-22); and

e) There is no evidence in the record supporting Plaintiff's second claim under the FCRA (Doc. No. 39, at p. 22).

In order to create a genuine issue of fact, Plaintiff was required to point to facts in the record which to oppose these assertions. Plaintiff's opposition brief fails spectacularly.

A. Plaintiff's claim under the FDCPA

Plaintiff offers no facts to oppose Federated's position that it is not a "debt collector" governed by the FDCPA, and that the underlying debt is not a "consumer debt." Doc. 39, at p. 13. Instead, he states that he is withdrawing his claims under the FDCPA. Doc. 54, at p. 1, FN 1. As such, this Court should enter judgment in Federated's favor on Plaintiff's claims under the FDCPA.

B. Plaintiff's claim that Federated's investigation of his credit dispute was not reasonable under Section 1681s-2(b) of FCRA.

Plaintiff alleges that Federated violated Section 1681s-2(b) of the FCRA, which requires a furnisher of information to conduct a reasonable investigation of a consumer dispute, upon receiving notice of that dispute from a credit reporting agency. 15 U.S.C. § 1681s-2(b). Federated had thirty days to conduct this investigation upon receiving that notification, and to report the results of that investigation back to the credit reporting agency for its consideration. Id. It is not Federated's burden at trial to establish that its investigation of Plaintiff's credit dispute was reasonable – instead, it is Plaintiff's burden to demonstrate that the investigation conducted by Federated was **not** reasonable. *See also, e.g. Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 n. 5 (C.A.D.C., 1984) (concluding that these sections show that Congress "'knew how' to shift the burden from plaintiff" to the consumer reporting agency).

Federated pointed this Court to the lack of evidence in the record establishing that it violated Section 1681s-2(b). Doc. No. 39, at pp. 14-15. Because Plaintiff bears the burden of proof at trial, in order to create a genuine issue of fact, he was required to point to specific facts in the record establishing that Federated's investigation was not reasonable. Plaintiff's opposition brief fails in that burden of production for the followings reasons:

1. Federated owed no duty to Plaintiff.

This Court should adopt the position of the Northern District of Ohio, which has held that a furnisher's duty to conduct an investigation is owed specifically to the credit reporting agencies, as it is those agencies which face the gravest liability under the Act. *Zamos II v.Asset Acceptance, L.L.C.,* 423 F.Supp.2d 777, 788 (N.D.Ohio, 2006). As such, only the credit reporting agency should have standing to bring an action against a furnisher for its violation of Section 1681s-2(b) of the FCRA. *Id.* This position is far more consistent with the purpose of the FCRA. 15 U.S.C. § 1681b.

2. Plaintiff has pointed to no evidence in the record establishing any of the various factors which Courts consider while considering the reasonableness of a furnisher's investigation of a consumer dispute.

Plaintiff argues that Federated's motion for summary judgment should be denied because it does not establish that Federated's investigation of his credit dispute was "reasonable[] beyond question." Doc. No. 54, at p. 10. However, this argument fails, as it ignores the basic tenants of a motion for summary judgment, as set forth above by *Celotex* and Fed.R.Civ.P. 54, and, more specifically, because Plaintiff's opposition fails to point to facts in the record which support any of the factors he needs to establish that Federated's investigation was not reasonable.

Courts have considered several factors in determining whether a furnisher of information's investigation of a consumer dispute was reasonable according to the "reasonably prudent furnisher of information in similar circumstances," including comparing the cost to the furnisher to avoid harm, to the magnitude of harm to be avoided; as well a comparison of the defendant's conduct with that of the industry standard. Doc. No. 39, at p. 16; Doc. No. 46, at pp. 4-5. Plaintiff's opposition fails to demonstrate what the reasonably prudent furnisher would have done when that investigation is prejudicially disrupted by a consumer's own irresponsible and premature lawsuit filed **five days after its duty to act arose**, and how such action should not create irreconcilable internal havoc upon that furnisher during the course of its investigation. Doc. 39, at pp. 10-11, 17. He cites no facts which address the cost-benefit analysis utilized by Courts, and none which demonstrate that Federated's conduct fell below that of the industry standard. As such, Plaintiff's opposition has failed to create a genuine issue of fact.

3. The evidence to which Plaintiff does point in his opposition brief is irrelevant, and therefore fails to create a genuine issue of fact.

In an effort to create a genuine issue of fact, Plaintiff points to fact in the record which are irrelevant or inadmissible. Therefore, the following references do not create a genuine issue of fact, for the following reasons. *See e.g. Keenan v. Allan,* 91 F.3d 1275, 1278-79 (9th Cir.1996) ("that party must nonetheless set forth such facts in support of his case as would be admissible at trial, and may not merely rest on conclusory allegations, and irrelevant or inadmissible evidence).

a. Federated's duty to act arose on May 12, 2007, not upon receipt of Plaintiff's April 30, 2007 letter.

In support of Plaintiff's contention that Federated's investigation was not reasonable, Plaintiff states that Federated's motion for summary judgment fails to address "the investigation behind its May 4, 2007, letter information Mr. Ferrarelli that it had determined the Account was his[,]" Doc. 54, at p. 8, the "24 hour" decision that "Mr. Ferrarelli was not the victim of identity theft[,]" Id., and that Federated's expert witness "does not mention the one-day decision expressed in Federated's May 4 letter." Id., at p. 9. However, Federated's "one day" investigation following its receipt of Plaintiff's April 30, 2007 letter is irrelevant.

"If it is assumed that a private right of action exists under § 1681 s-2(b) , the plaintiff must show that the furnisher received notice from a consumer reporting agency, not the plaintiff, that the credit information is disputed." *Downs v. Clayton Homes, Inc.,* 88 Fed. Appx. 851, 854 (6th Cir., 2004). Here, Plaintiff concedes that Federated first received notice of his credit dispute from a credit reporting agency, Transunion, on May 12, 2007. Doc. No. 54, at p. 6. Therefore, there is no genuine issue of fact that Federated's duty to conduct its investigation arose on May 12, 2007, and not before.

The April 30, 2007 letter that Federated received directly from Plaintiff imposed no duty upon Federated to do anything under the plain language of the FCRA. *Downs,* mentioned *supra.* Although Plaintiff seeks to make Federated's conduct prior to May 12, 2007 an issue for this court to consider, such conduct has no bearing on whether it violated the FCRA, and does not create a genuine issue of fact as to the reasonableness of Federated's investigation.

b. *James Whitaker's Expert Report.*

In its motion for summary judgment, Federated pointed to the expert testimony of Anne Fortney, an attorney with over thirty years of experience enforcing the Fair Credit Reporting Act, to support its position that the investigation it conducted of Plaintiff's credit dispute was reasonable according to industry standards. Doc. No. 39, at p. 17. To refute this testimony, Plaintiff points to the report of his expert James Whitaker to create a genuine issue of material fact as to the reasonableness of Federated's investigation. Doc. No, 54, at p. 9, FN 8.

In order to create a genuine issue of fact by presenting expert testimony, that expert testimony must be admissible. *Mid-State Fertilizer Co. v. Exchange Nat. Bank,* 877 F.2d 1333, 1339 (7th Cir.1989). Defendant incorporates, as if fully rewritten herein, its Motion in Limine, where it details why Mr. Whitaker's opinion is inadmissible in this matter. Doc. No. 46. For the reasons set forth in that unopposed motion, Mr. Whitaker is not qualified to testify as an expert in this action, Id., at pp. 6-10, and his opinion is not based upon sufficient factual data in his possession at the time he generated his report. Id., at pp. 10-13.

Moreover, Mr. Whitaker testified that determining whether Federated's investigation was reasonable according to the standards of Section 1681s-2(b) of the FCRA was "out of the scope of [his] assignment." Doc. No. 46-1, at p. 126. Instead, the purview of his assignment was "to find out if [Plaintiff] was a victim of identity theft as he alleged." Id., at p. 90; *see also* Id., at p. 116 ("At the risk of repeating myself, the purpose of the interview in my mind was to determine whether or not [Plaintiff] could reasonably have been a victim of identity theft."). Such determinations are not at issue in this litigation, rendering Mr. Whitaker's report and opinion expressed therein meaningless palaver. Therefore, the mention of Mr. Whitaker's testimony fails to create a genuine issue of fact as to the reasonableness of Federated's investigation of Plaintiff's credit dispute.

C. Plaintiff pointed to no evidence in the record establishing that Federated's alleged violation of the FCRA was "willful."

Federated agrees that this Court is not required to "search the record to further back up [Federated's] position" that its conduct was not "willful." Id. Rather, it is Plaintiff's affirmative duty to point to specific facts in the record establishing Federated's "willful" violation of the Act, in order to create a genuine issue of fact. *See Celotex*, mentioned *supra; Goodby v. Wells Fargo Bank, N.A.*, Case No. No. 1:07cv229, unreported, 2008 WL 4449517, at *7 (S.D.Ohio, Sept. 30, 2008).

As stated by the Honorable Judge Smith of the Southern District of Ohio, a furnisher of information's "[f]ailure to adequately re-investigate or promptly correct or delete information after notice does not constitute willfulness" as a matter of law, under Section 1681s-2(b) of the FCRA. *Garrett v. Trans Union, L.L.C.*, Case No. No. 2:04-CV-00582, unreported, 2006 WL 2850499, at * 12 (S.D.Ohio, Sept. 26, 2006); *citing Stevenson v. TRW, Inc.,* 987 F.2d 288, 293 (5th Cir.1993)*; Pinner v. Schmidt,* 805 F.2d 1258 (5th Cir.1983); *Casella v. Equifax Credit Information Services*, 56 F.3d 469, 476 (2nd Cir., 1995). In granting a furnisher of information summary judgment on the issue of willfulness under Section 1681s-2(b) of the Judge Smith stated that there must be specifics facts in the record demonstrating a willful violation:

> In the instant case, there is no genuine issue of material fact as to willful violations. It is undisputed that Citifinanical investigated Plaintiff's credit report following the request from Trans Union. Plaintiff has offered no proof of a willful violation beyond his accusations that Citifinancial continued to report inaccurate information following its investigation and also his conclusory allegations that Citifinancial reported this information "willfuly." Thus, Plaintiff has not met his burden of showing that Citifinancial knowingly and intentionally committed an act in conscious disregard for the rights of others. Accordingly, this Court finds that, as a matter of law, even if Plaintiff could prove Citifinanical violated the FCRA, he is not entitled to punitive damages under § 1681n.

Garrett, at *13.

Similarly here, it is undisputed that Federated investigated Plaintiff's dispute following notification from Transunion. Doc. 39, at pp. 10-12, Doc. 54, at pp. 6-9. While arguing that Federated's investigation of that dispute was not reasonable or adequate, Plaintiff points to no evidence in the record demonstrating a "willful" violation of the Act, and none that Federated committed an act in conscious disregard for the rights of others. Instead, Plaintiff summarily concludes that "[i]n these circumstances a jury could easily find willfulness." Doc. 54, at p. 12. Such a conclusory allegation does not create a genuine issue of fact as to the willfulness of Federated's alleged violation. *Garrett*, at *13.

Further, Plaintiff's discussion merely challenges the adequacy of Ted Sobiseki's investigation, and the one-day decision letter of May 4, 2007 is irrelevant for the reasons mentioned, *supra*. Plaintiff also points to the "ample documentary backup for the truth" in Federated's possession that had been provided by Plaintiff, that "Federated should have reviewed." Doc. No. 54, at p. 11. But, Federated was not required to review that information. The Act explicitly states that a furnisher of information is only "required to review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title[.]" 15 U.S.C. § 1681s-2(b)(1)(B). Plaintiff points to no information provided to Federated by Transunion that Federated consciously disregarded after receiving notice of Plaintiff's dispute, on May 12, 2007.

D. Plaintiff's opposition points to no facts in the record demonstrating that his alleged damages are causally related to Federated's alleged misconduct.

This Court has recently articulated the burden placed upon a Plaintiff seeking non-pecuniary, emotional damages under the FCRA:

> While "actual damages" may include emotional distress, because emotional distress damages are so easy to manufacture, courts have imposed a strict standard to be applied for them to be recoverable. Accordingly, generalized claims of emotional injury are not enough to establish damages. When the plaintiff's testimony is the only proof of emotional damages, he or she must explain the circumstances of the injury in reasonable detail and cannot simply rely on conclusory statements.
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> *Garrett v. Trans Union, L.L.C.,* 2006 WL 2850499, *11 (S.D.Ohio Sept. 29, 2006) (unpublished) (citations omitted). In addition, a plaintiff must show a causal relationship between the violation of the statute and the loss of credit, or some other harm. *Id.* (citations omitted).

Goodby v. Wells Fargo Bank, N.A., Case No. 07 CV 229, unreported, 2008 WL 4449517, at * 8 (S.D.Ohio, Sept. 30, 2008).

In response to Federated's first set of Interrogatories on the issue of damages, Plaintiff states the following:

> 6. Itemize and describe all compensatory and actual damages you seek as alleged in your Complaint in reasonable detail:
>
> * * *
>
> **In Plaintiff's Words:** [1]
>
> You couldn't begin to understand the depression & loss of self esteem I have experienced. My ill mother came to stay with me as she was no longer able to care for herself. **Due to your false reporting I was unable to provide badly needed bath facilities & space for her & my family when most needed. She passed about a month after I finally received a loan that would be adequate to make the changes in my home. It was too late… I can't stop thinking about what I could have done to comfort her if I had the funds sooner**. In addition I have been humiliated when applying for credit & attempting to explain the fraud. **I never had a problem qualifying for a loan prior to this**. I haven't slept well in months, I'm sick to my stomach all of the time, I 'm short with my wife & son & I can't focus on even simple tasks without my mind racing. Now I'm taking medication to try to

[1] This part only was in bold in Plaintiff's discovery response.

> control my anxiety & depression. If I don't get my blood pressure under control soon my doctor has informed me I will need to begin treatment for that too. **Time spent applying for loans repeatedly due to being denied even after explaining the negative information on my credit report**. Time and money spent going to Dr. appointments & getting medication. **Not being able to obtain credit at a competitive rate or any rate when I desperately needed it**. For being upset to the point of being physically ill, its all I can do some days to force myself out of bed to go to work. The undue stress placed on my wife & son. I can see the sorrow in their eyes because they are so concerned about my depression, I try not to show it but obviously I do. My wife gets agitated with me because I don't feel like attending social events or even being intimate. I don't think words can describe how all these things snow ball to make me feel worse all the time.

Doc. No. 39, Plaintiff's Responses to Defendant's First Set of Interrogatories, # 6 (emphasis added). At deposition, Plaintiff stated that his position on damages as described in his above interrogatory response has not changed. Doc. No. 39, at Plaintiff's Deposition, at pp. 13-14, 141 - 143.

However, in opposing Federated's summary judgment motion, Plaintiff now states this case has nothing to do with his mother, or his inability to receive a loan:

> [Federated] argues that Mr. Ferrarelli's "entire claim for emotional distress is his assertion that he was unable to received financing for purposes of remodeling his home for his ailing mother." **This is incorrect**. * * * Mr. Ferrarelli's non-economic damage claim is based in great part upon Federated's wrongful assertions to credit reporting agencies, for a full year, that caused him the type of distress and feelings of helplessness set forth in the report, **irrespective of his inability to obtain a loan**.

Doc. No. 54, at pp. 54 (emphasis added).

Given these opposing representations, it is difficult to decipher what Plaintiff's theory of emotional damages actually consists of. Plaintiff's opposition is clearly aimed at creating this confusion, and *a fortiorari*, creating a genuine issue of fact which would preclude summary judgment in Federated's favor. However, Plaintiff's position, whatever it is, cannot survive Federated's motion for summary judgment for the following reasons:

1. ***Plaintiff has failed to point to any evidence in the record supporting her First Theory of Damages.***

Plaintiff's "first theory of damages" is that his emotional injury stems from his inability to receive timely financing to remodel his home, which would have eased his ailing mother's mobility issues. Plaintiff alleges that this inability to receive financing "when [he] desperately needed it" was allegedly caused by Federated's failure to conduct a reasonable investigation of his credit dispute.

However, Plaintiff did receive a loan, which would have been adequate to complete this home renovation project. Doc. No. 39, at p. 6. Fifth-Third Bank offered him a loan on May 14, 2007 – two days after Federated's duty to act arose, twenty eight days prior to that duty's expiration, and two months before his mother's passing. Id. Given this, there can be no causal connection between Defendant's alleged misconduct which occurred on June 11, 2007, and Plaintiff's inability "to provide badly needed bath facilities & space for [his mother] & [his] family when most needed."

Nevertheless, in order to establish causation on such a claim, Plaintiff must first demonstrate that his actual credit was damaged as a result of incorrect items on his consumer report, and that a financier denied him credit as a result of that erroneous information. As stated by the District Court of Nevada:

> In order to prove actual damages under the FCRA, Plaintiff must show Defendant's violation caused Plaintiff, as an individual consumer, the alleged damages he claims in each of the transactions at issue. Under the facts of this case, a consumer report is necessary to make that causal connection.
>
> * * *
>
> To further illustrate why a consumer report is vital to Plaintiff's claim, the court turns to Plaintiff's alleged damages resulting from a third-party's decision to deny Plaintiff credit, increase his interest rates and cancel or reduce his existing lines of credit due to Defendant's erroneous reporting. **In order to be recoverable as actual damages under the FCRA, those decisions must have been made based on the erroneous information reported by Defendant**. In order to show the decisions were made based on that erroneous information, the decision-makers must necessarily have had knowledge of the erroneous information. In order to acquire such knowledge, the decision-makers must have obtained a credit report containing the erroneous information. And, in order to be subject to the FCRA, the credit report obtained must have been a consumer report as defined under the FCRA. Thus, a consumer report is vital to Plaintiff's claim. **Without the consumer report, a plaintiff would essentially be able to claim every undesirable financial event he encountered since the defendant's violation without actually proving the event occurred because of defendant's violation, rather than due to some other reason**.

Johnson v. Wells Fargo Home Mortg., Inc., 558 F.Supp.2d 1114, 1122 -1123 (D.Nev., 2008) (emphasis added).

Plaintiff has failed to point to **any** facts in the record demonstrating that, but for Federated's allegedly inaccurate credit reporting, a financier would not have denied him a particular extension of credit. Absent such facts, a jury would not be able to determine that these loan denials, which have caused him so much angst, are attributable to Federated's alleged violation as opposed to some other reason – including his $1 million in personal debt. Doc. 39, at p. 19.

Plaintiff has also conceded that the Federated account was but one of several derogatory trade lines on his credit report, which in combination probably caused his loan denials. Plaintiff's Deposition, at pp. 122, 127-129, 150. However, in order to establish a causal connection to Federated's alleged violation under such circumstances, Plaintiff must produce sufficient evidence from which a reasonable trier of fact could find that Federated's inaccurate entry was a "substantial factor" that brought about that particular denial of financing:

> In order for Murphy to create an issue as to causation of the credit denial, she is required to produce evidence that the inaccurate entry was a "substantial factor" in the denial of credit. *Reed v. Experian Info. Solutions, Inc.,* 321 F.Supp.2d 1109, 1115 (D.Minn.2004). The Community Bank denial letter states that the principal reasons for the denial included "excessive obligations in relation to income," "delinquent past or present credit obligations with others," and "garnishment, attachment, foreclosure, repossession, collection action or judgment." In addition to the delinquent Midland account, Murphy's credit report contained other negative tradelines. Murphy admits that because of these negative tradelines, her credit report "doesn't look good." Murphy has put forth no evidence from Community Bank that the Midland account was a substantial factor in the loan denial, and as a result, Murphy has failed to meet her burden on this issue.

Murphy v. Midland Credit Management, Inc., 456 F.Supp.2d 1082, 1092 (E.D.Mo.,2006); *Garrett*, at *11, FN 5; *Philbin v. Trans Union,* 101 F.3d 957 (3rd. Cir.1996)

Plaintiff failed to establish any facts that would permit this Court to conclude that it was Federated's derogatory trade line that was the substantial factor in Plaintiff's alleged denial of credit and corresponding emotional distress. As a result, Plaintiff has failed to meet his burden on this issue, entitling Federated to summary judgment.

3. Plaintiff cannot generate a new theory of damages in order to create a genuine issue of material fact.

Plaintiff's theory on damages is confused at best, manufactured at worst. As described above, Plaintiff's consistent position throughout this litigation has been that his emotional suffering is attributable to his inability to receive timely financing for purposes of easing his ailing mother's mobility constraints. He now states that this assertion is "incorrect" and that his "non-economic damages claim is based in great part upon Federated's wrongful assertions to credit reporting agencies, for a full year, that caused him the type of distress and feelings helplessness set forth in the report, irrespective of his inability to obtain a loan." Doc. No. 54, at p. 14. But, Plaintiff is not permitted to manufacture such confusion in the record to avoid summary judgment.

"[A] nonmoving party 'cannot defeat a motion for summary judgment by submitting an affidavit [that] directly contradicts, without explanation, his previous testimony.'" *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 908 (6th Cir., 2006); *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 806, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999) (collecting cases); *Reid v. Sears, Roebuck & Co.,* 790 F.2d 453, 460 (6th Cir.1986); *citing Biechele v. Cedar Point, Inc.,* 747 F.2d 209, 215 (6th Cir.1984). The reasoning for this rule is simple:

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Reid, 790 F.2d at 460; *Biechele,* 747 F.2d at 251. "These rules invariably reflect the importance of distinguishing legitimate efforts to supplement the summary judgment record from attempts to create a sham issue of material fact." *Aerel*, at 908.

In his opposition brief, Plaintiff submits an affidavit incorporating the report of his expert, which theory of his emotional damages inexplicably contradicts his own previous testimony. Doc. 53, at ¶ 13. By doing so, Plaintiff seeks to establish a sham issue of fact in order to defeat Federated's motion for summary judgment. This Court should dismiss this tactic, and focus its attention on whether Plaintiff has presented any evidence to create an issue of fact on his "first" theory of damages, regarding his inability to obtain a loan, and his ailing mother.

4. Plaintiff's Second Theory of Damages is not recoverable under the FCRA.

Plaintiff's "new" theory of damages challenges the accuracy of Federated's trade line, and seeks to relate to the distress and anxiety he suffered as a result. Doc. No. 54, at p. 14. Should this Court elect to consider this "second" theory of damages, Plaintiff is nonetheless not entitled to recover damages which result from Federated's inaccurate credit reporting.

Section 1681s-2(a) of the FCRA provides the second duty a furnisher of information has under the FCRA, which provides, in relevant part: "A [furnisher] shall not furnish information * * * to any consumer reporting agency if * * * the [furnisher] has been notified by the consumer * * * that [the] specific information is inaccurate * * * and * * * the information is, in fact, inaccurate." 15 U.S.C. § 1681s-2(a)(1)(B). However, the provisions of Section 1681s-2(a) are to be "enforced exclusively * * * by the Federal agencies and officials and [certain] State officials[.]" 15 U.S.C. § 1681s-2(d). Thus, there is no private right of action for a violation of Section 1681s-2(a). *See, e.g., Fino v. Key Bank of New York,* No. Civ. A. 00-375E, 2001 WL 849700 (W.D.Pa. July 27, 2001).

When addressing an FCRA claim challenging the accuracy of information provided by a furnisher of information, the District Court of Minnesota held that damages resulting therefrom are not recoverable under the Act:

> Mr. Danielson's arguments reveal that his FCRA claim is one that challenges the accuracy and completeness of the information provided by Aurora to the CRAs. The FCRA imposes a duty on those who furnish information to a consumer reporting agency to provide complete and accurate information. 15 U.S.C. § 1681s-2(a).

> Unfortunately for Mr. Danielson, the FCRA provides that section 1681s-2(a) "shall be enforced exclusively" by federal and state authorities. 15 U.S.C. § 1681s-2(d). Therefore, Mr. Danielson's FCRA claim must be dismissed. *See id.; Johnson,* 357 F.3d at 433.

Danielson v. Experian Information Solutions Inc., Case No. Civ. 03-2820, 2004 WL 1729871, at * 10 (D.Minn., July 30, 2004).

Similarly, Plaintiff's "second" claim for damages is one that challenges the accuracy of the information Federated provide to the credit reporting agencies "for a full year[.]" Doc. No. 54, at p. 14. However, he is not entitled to damages that he attributes to "Federated's wrongful assertions to credit reporting agencies" as argued in his opposition brief, for the reasons detailed above. As such, Federated is entitled to judgment as a matter of law on Plaintiff's second theory of damages, as well.

E. Plaintiff's "Second Claim" for a violation of the FCRA.

Plaintiff offers no evidence to oppose Federated's position against his second claim under the FCRA - instead, he states that he is withdrawing that claim. Doc. 54, at p. 1, FN 1. As such, this Court should enter judgment in Federated's favor on Plaintiff's second claim under the FCRA.

III. Conclusion

The well intentioned purpose of the Fair Credit Reporting Act is to ensure that companies dealing in consumer credit exercise their responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy. It was not intended to be, nor should it be, a conduit through which a consumer, dissatisfied with the state of his financial affairs, can play roulette with the Federal Court system, and seek compensation on a theory of damages which can be described as ephemeral, at best. It is time for this fee driven claim, based on unwarranted and unsupportable extensions of the Fair Credit Reporting Act, and upon a fabricated theory of emotional distress, to come to an end.

Plaintiff has no admissible evidence establishing that Federated's investigation of his credit dispute did not meet the requirements of Section 1681s-2(b) of the FCRA. Even Plaintiff's emotional damages are unsupported by any evidence, and based exclusively upon the Plaintiff's misconstrued beliefs and misperceptions of what actually occurred, in an attempt to advance a theory which might most influence the passions of a jury, rather than proffer any other theory based upon the actual facts and events in this case. Because Plaintiff has failed to create any issue of fact as to the un-reasonableness of Federated's investigation, nor point to any facto which might tie his fabricated emotional distress to the alleged misconduct of Federated, this Court should grant Federated's Motion for Summary Judgment.

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that on December 23, 2008 a copy of the foregoing was filed electronically in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to parties by operation of the court's electronic filing system. Parties may access this filing through the court's system.

Respectfully Submitted,

/s/ R. Glenn Knirsch
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